

*United States Court of Appeals
for the Second Circuit*



**APPELLEE'S
APPENDIX**

~~78-1085~~

77-1035

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 77-1035

B

UNITED STATES OF AMERICA,

Appellee,

- against -

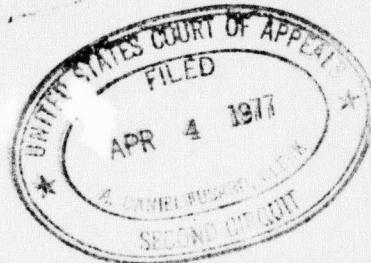
PASQUALE MADDALENA,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

GOVERNMENT'S APPENDIX

DAVID G. TRACER,
United States Attorney,
Eastern District of New York.



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1 MR. LEFKOWITZ: Thank you, your Honor.

4

2 MR. DAWSON: Your Honor, I have some house-
3 keeping matters and perhaps we can make use of a few
4 moments to dispose of them.

5 I have premarked a Government list of 3500
6 material and premarked Government's exhibits for
7 identification. Counsel has been shown both of those
8 types of material. I would like to file this with
9 the clerk.

10 Moreover, I guess it was over lunchtime, counsel
11 and I reviewed certain material together and we have
12 agreed on certain stipulations that might expedite.
13 I would like to place those on the record.

14 THE COURT: If you have agreed, put them before
15 the jury.

16 MR. DAWSON: I want to make sure we have a
17 complete understanding before I release the witnesses
18 from out of town.

19 Counsel, as I understand it, is stipulating
20 that the defendant was employed as a United States
21 Department of Agriculture meat inspector at the
22 establishment listed in each of the five counts of the
23 indictment on the dates or between the dates alleged
24 in each count of the indictment.

25 MR. LEFKOWITZ: That is correct.

Exhibit A-1

1 MR. LEFKOWITZ: Okay.

2 MR. DAWSON: I understand counsel has no
3 objection.

4 MR. LEFKOWITZ: No objection.

5 THE CLERK: Marked in evidence?

6 THE COURT: Yes.

7 THE CLERK: Government's Exhibit 38 in
8 evidence.

9 (So marked.)

10 MR. DAWSON: If your Honor pleases, the
11 Government would like to introduce in this case, in
12 addition to the counts alleged, two witnesses concern-
13 ing prior similar acts of this defendant. This
14 activity as charged in the indictment. For a relatively
15 brief period, September 1973 to the early part of 1974.
16 Unless the jury is entitled to hear evidence of the
17 defendant's prior conduct, it would seem to be
18 completely out of context for them to appreciate a
19 relatively short period of time -- two months period
20 of time -- suddenly materializing out of the blue after
21 the defendant had been on the staff of the Department
22 of Agriculture for several years.

23 These two witnesses would testify to the
24 defendant's similar activity, harrassment activities
25 of their operation, solicitation of them for money,

1 amount of monies, the period of time they paid him,
2 and the set of facts they operated under when the
3 payment was made.

4 So that when the jury then hears the evidence
5 concerning the acts alleged in the indictment, at
6 least the jury has an understanding of the context --

7 THE COURT: What period are the independent
8 acts?

9 MR. DAWSON: The defendant became an inspector
10 in February 1970, he was trained for a brief period of
11 time, the acts occurred '71 and '72.

12 THE COURT: A year and two years before the
13 ones charged?

14 MR. DAWSON: Yes.

15 THE COURT: How many acts?

16 MR. DAWSON: From the period assigned to each of
17 those places; each week during the period of assignment.
18 The gentlemen do not know how long he was there since
19 there are no Agriculture Department records to estab-
20 lish that.

21 THE COURT: Same method of operation?

22 MR. DAWSON: Yes.

23 THE COURT: What is the objection?

24 MR. LEFKOWITZ: Your Honor, whatever facts the
25 counsel for the Government has just mentioned were well

1 known to the Government at the time when they saw fit
2 to present evidence to the Grand Jury. I have seen,
3 by 3500 material which was graciously handed to me
4 today instead of after the witness testified, that one
5 of these two people he's talking about testified
6 before the Grand Jury.

7 Now, I submit that I don't think it is proper
8 practice to -- if they're aware of any wrongdoing and
9 where the Statute of Limitations does not bar prosecu-
10 tion -- to selectively target for the defendant by way
11 of an indictment and come in on the day of trial and
12 say we would like to introduce other evidence of
13 similar conduct.

14 THE COURT: You were aware of this before the
15 date of trial.

16 MR. LEFKOWITZ: I beg your pardon?

17 THE COURT: You were aware of this before the
18 date of trial?

19 MR. LEFKOWITZ: No. But I am not making that a
20 point.

21 THE COURT: When did you notify counsel?

22 MR. DAWSON: I think we discussed the case last
23 week.

24 MR. LEFKOWITZ: Not prior conduct.

25 MR. DAWSON: No.

THE COURT: When did you tell him about the prior conduct?

MR. DAWSON: I think I gave the material this morning.

THE COURT: That is not enough advance notice, I think.

MR. DAWSON: The difficulty with pursuing a course such as counsel suggests --

THE COURT: I am not asking for that course. I
don't think you have to go before the Grand Jury.
But I think you have to give him some notice. He's
got to try those cases too, in effect.

rebuttal so we will have over the weekend --

THE COURT: If it comes up over the weekend, all right. If the man takes the stand you can cross-examine of course.

Thank you. You may take a few minutes.

(A recess taken at this time.)

(Continued next page)

Exhibit A-5

1 THE COURT: Gentlemen, any further applica-
2 tions?

3 MR. DAWSON: I have one, your Honor.

4 Counsel for the defendant, in his opening
5 statement, said that the Government will not demon-
6 strate or show you, I believe were his words, that
7 the defendant committed any such acts as alleged
8 in the indictment before 1973, and I think that is
9 taking unfair advantage of what we discussed at
10 side bar.

11 THE COURT: I believe it is.

12 MR. LEFKOWITZ: I want to represent to the
13 Court that my colleague told me last week--

14 THE COURT: You know what you were told today.

15 MR. LEFKOWITZ: I know what I was told today.

16 THE COURT: You said it could be used on
17 rebuttal or cross-examination.

18 MR. LEFKOWITZ: I represent to the Court
19 what I know from my client, which has been corroborat-
20 ed until today by Mr. Dawson, who told me that my
21 client had no violation charged against him of any
22 kind prior to the date, or possibly that date,
23 and that is when you and I were discussing Section --
24 what is it? -- 29 --

25 MR. DAWSON: 209.

1 MR. LEFKOWITZ: I am not misrepresenting
2 when I tell this to the Court.

3 MR. DAWSON: I am not quite sure what you
4 are telling the Court.

5 MR. LEFKOWITZ: That you told me what I just
6 said.

7 THE COURT: It doesn't make any difference.
8 That evidence will probably come in.

9 Good night.

10 MR. DAWSON: Thank you, your Honor.

11 THE COURT: Good night.

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22 Exhibit A-7
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MR. LEFKOWITZ: Your Honor, in connection with Mr. Dawson's application at the commencement of trial about the introduction of similar acts, I at that time pointed out to the Court that I had told Mr. Dawson that he had represented to me in the course of my inquiry insofar as motions relating to discovery were concerned that this defendant was charged with wrongdoing on a particular date -- particular date -- and that there were not acts of any such wrongdoing approaching those dates or prior to those dates.

Now, I respectfully am urging upon the Court in view of this representation to keep such testimony or evidence out at this time.

MR. DAWSON: If your Honor pleases, my recollection is somewhat different from that of Mr. Lefkowitz. I certainly recall representing to him there was no post-period of the indictment similar acts, I have in my file six similar acts pre the period in the indictment. I can't imagine myself saying I didn't have. If it was a question of one, I could say I overlooked it, . . . --

THE COURT: You may proceed in accordance with my prior instructions.

MR. DAWSON: I padded it down and told Mr. Lefkowitz I was seeking only one witness to testify

1 as to a similar act.

2 THE COURT: In view of the nature of the cross-
3 examination, suggesting that the witnesses are mistaken
4 about the identification of this defendant as the
5 person who took bribes -- not bribes -- or supplement
6 of their income, I think it is appropriate. You may
7 continue.

8 It will be limited to reduce the possible harm
9 to the defendant, instead of using six prior acts you
10 will only use one prior act. That seems reasonable.

11 MR. LEFKOWITZ: I just learned it was six.
12 The last time it was two.

13 MR. DAWSON: Two I was prepared to introduce,
14 but I have six in the file. I have given Mr. Lefkowitz
15 the grand jury and notes of interviews of witnesses.

16 THE COURT: All right, bring in the jury.

17 (The jury is in the jury box.)

18 THE COURT: Are we still short one of the jurors?

19 You are all here now.

20 MR. DAWSON: May I proceed with the next witness,
21 your Honor?

22 THE COURT: Good morning, everybody, I hope you
23 had a pleasant holiday.

24 J A C K B O R N S T E I N , a witness called on behalf of
25 the United States of America, was sworn by the Clerk

2 Q In what capacity?

3 A As a government inspector.

4 Q In the past, was he assigned and worked in your
5 place, the Omaha Hotel Supply Corporation?

6 A Yes, he was.

7 Q Now, it's been stipulated that in approximately
8 the first week of February, 1973, the defendant was employed
9 by the United States Department of Agriculture as a meat
10 inspector, assigned to Omaha Hotel Supply Corporation. Other
11 than that one week period in '73, had the defendant been
12 assigned to your premises on prior occasions?

13 A Yes.

14 Q For how long approximately a period of time?

15 A I think several weeks in '72.

16 Q Now, did anything occur between yourself and
17 the defendant with respect to money?

18 A Yes.

19 MR. LEFKOWITZ: When?

20 Q 1973, that one week in February?

21 A Yes.

22 Q Did anything occur between yourself and the
23 defendant during those several weeks in 1972?

24 A Yes.

25 Q Would you tell the ladies and gentlemen of the
Exhibit A-10

1
2 jury what occurred between yourself and the defendant with
3 respect to money in 1973?

4 A I paid the inspector -- I think it was \$25 a
5 week continuously.

6 Q Would you tell the ladies and gentlemen of the
7 jury what took place between you and the inspector with respect
8 to money in 1972?

9 MR. LEFKOWITZ: Objection, your Honor.

10 THE COURT: Overruled.

11 Q You may answer.

12 A Same thing as in '73.

13 MR. LEFKOWITZ: Your Honor, I object. There's
14 no evidence in this record that this man worked at his
15 plant in '72. There is a stipulation on file which I
16 entered with Mr. Dawson relating to any employment
17 with this man in '73, from January 4th -- excuse me --
18 From February 4, '73 to February 10, '73.

19 THE COURT: Well, you may cross-examine it.

20 Now, ladies and gentlemen, there may be evidence
21 of an act prior to that charge or acts prior to that
22 charge. Those acts or that act may not be used by you
23 as evidence that this defendant had a bad character
24 and therefore did the bad acts which were charged.
25 They may be used by you only to show if you believe

that they existed that there was a plan or that there
was an intent or an opportunity, or that this man was
the person identified as the inspector charged
specifically.

Is that clear? He is not being tried for
anything else that he may have done right or wrong or
indifferent, but only for those acts charged in the
indictment. Is that clear?

And it would be absolutely impermissible for
you to conclude from a different act that he was a
bad person and therefore did the particular bad acts
charged. Is that clear?

Is there any other charge that you would like
on behalf of the defendant at this time?

MR. LEFKOWITZ: No, your Honor. But I
respectfully submit that in addition to everything
else, there was no such representation made to counsel
in his request for discovery and particularization.

(continued next page)

Exhibit A-12

2 THE COURT: Well, the witness may have been
3 mistaken. And if so, you will develop that on cross-
4 examination.

5 You may proceed.

6 Q Now, Mr. Daren, with respect to 1972, would
7 you tell the ladies and gentlemen of the jury some of the
8 activities of the defendant while he was an inspector at
9 your company premises in 1972?

10 MR. LEFKOWITZ: Objection.

11 THE COURT: Overruled.

12 Q You may answer.

13 A Well, upon arriving at our place, the
14 inspector immediately harassed us, coerced us. Well,
15 everything went upside down. Nothing could move. Nothing
16 could go. Everything just stopped. And, frankly speaking,
17 we were at our wit's end.

18 Q Could you give the ladies and gentlemen of the
19 jury some specifics?

20 A Well, we have a conveyance that -- we did
21 have a conveyance when we were at our former location in '72
22 where the merchandise used to ride on a belt, stainless
23 steel belt, go down to a -- rather, the machine was stainless.
24 The belt was a white plastic. Whatever you want to call it.

25 Anyway, the merchandise went this way, and it

1 Is the charge satisfactory?

2 MR. LEFKOWITZ: The charge is satisfactory.

3 THE COURT: Satisfactory to the Government?

4 MR. DAWSON: It is, your Honor. I would just
5 like to call the Court's attention to the possible
6 necessity of -- about similar act testimony.

7 THE COURT: I put it in in this form. It's
8 essentially what I already instructed the Jury. There
9 was evidence of one act not charged. This may be
10 used as evidence of lack of mistake, plan, intent,
11 opportunity and identification only. You may not
12 conclude from this act, if it occurs, that the

13 defendant had a bad character and that therefore
14 he did an act charged.

15 Is that satisfactory?

16 MR. LEFKOWITZ: It is.

17 MR. DAWSON: No objection.

18 THE COURT: Thank you. All right, 1:30.

19 MR. LEFKOWITZ: I don't waive my objection
20 based on the introduction -- based on the grounds
21 that I stated on the record.

22 THE COURT: All right.

23 (Luncheon recess taken.)

24 (Continued on next page.)

3 1 Charge of the Court

2 You are going to have to rely upon your
3 experience as people of general affairs in the
4 community in interpreting this evidence. This
5 defendant is charged with five separate crimes based
6 on allegations that money was received by him during
7 the years 1973 and 1974. If they are true, this
8 would constitute a crime under the Federal Meat
9 Inspection Act which was passed in 1967, providing
10 for the Secretary of the Department of Agriculture
11 to insure that establishments preparing meat and
12 meat products would be inspected promptly.

13 Each of the counts has to be considered
14 separately by you. In effect, you are trying five
15 different cases.

16 Your finding as to guilt or innocence as to
17 each count doesn't necessarily determine how you
18 should find on any other count. But you may consider
19 the evidence as to any count in connection with any
20 other count.

21 There was evidence of one act not charged.
22 This may be used by you as evidence of lack of
23 mistake or plan or intent or opportunity or identity
24 but not as evidence that this person is a bad person
25 and therefore committed the bad act charged. If he

Charge of the Court

1 didn't commit the bad act charged, he must be
2 acquitted. It doesn't make any difference what he may
3 have done or what somebody else may have done.

4 The first charge reads as follows:

5 "From on or about the between the 4th day of
6 February, 1973, and 10th day of February, 1973, both
7 dates being approximate and inclusive, this defendant
8 unlawfully, willfully and knowingly did receive and
9 accept from Omaha Hotel Supply Corporation approximately
10 \$25."

11 The second count is the same except that it
12 charges between September 30th, 1973 and January 4,
13 1974, the defendant received approximately \$25 weekly
14 from George Korn & Sons, Inc.

15 The third count similarly charges that
16 between September 30th, 1974 and January 5, 1974, he
17 received approximately \$50 weekly from Bornstein
18 Brothers, Inc.

19 The fourth count similarly charges between
20 January 6, 1974 and April 6, 1974, the defendant
21 received approximately \$25 weekly from AAA Meat
22 Provisions Inc.

23 And the fifth charges that between September 30,
24 1973 and January 5, 1974, the defendant received
25

know exactly what he's after.

I'd like to talk for a few moments about an aspect of this case which I think you should bear in mind when you deliberate and discuss this among yourselves. This case isn't only about the defendant. This case is also about the public, about you and I, the people in this courtroom and elsewhere. We all can't be inspectors, whether it's Government inspectors, fire inspectors, and meat inspectors. We have to trust the people to do that for us because it's important work. So we let people apply for that job. And when we give them that job, we give them that badge of office. We give them that power in their hands. We give them the rules in their hands to follow. We give them our hope, our trust, our confidence that they will go out there and not only perform efficiently but honestly.

Obviously, we all can't be there to watch all the people that are watching for us. I submit to you when he would go in to Mr. Cucurullo, or Mr. Katz, or Mr. Rubin, or the others and stick out that hand for that money, that we had placed all that trust in and given all that authority, he was throwing that badge away. He was throwing that trust away because

2 he couldn't care less about it. What had to come
3 back in his hand was money. At the end of the day
4 on Friday there was only one thing, not whether the
5 company was running well or not, not whether the
6 conveyor belt was good or not -- money. That was
7 the only thing that mattered. And when he stuck out
8 that hand he knocked our hand away.

9 You must decide whether you will condone that
10 kind of conduct. You are the public after all.
11 What you say here will matter, whether you will
12 approve this kind of conduct, whether it sits well
13 with you, whether you are satisfied with that; or
14 whether or not you will say, any Federal employee
15 from the highest to the lowest to whom I have
16 entrusted responsibility is accountable to me as a
17 member of the public not to betray me, not to betray
18 that trust, not to say, I want more than the salary
19 that the public is paying. It would be, I submit,
20 a very sad day if all we could do was just hope and
21 trust for the best and never hold anyone accountable.
22 Because then we are at the mercy of the people that
23 we have sent out there to work for us. He is not
24 an inspector for himself. He is inspector for each
25 and everyone of us.